IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

THE BRITISH STEAMSHIP "COOLGARDIE," Libellee, and H. A. THOMSON, Master and Claimant,

Appellants,

vs.

WILLIAM F. JAMES,

Appellee.

IN REPLY TO APPELLANTS REPLY

FRANK E. THOMPSON,
JOHN W. CATHCART,
R. A. VITOUSEK,
Proctors for Appellee.

THOMPSON & CATHCART,
GRANT H. SMITH,
of Counsel.

THE RECORDER COMPANY, 689 STEVENSON ST., S. F.

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Local counsel who framed appellants' reply brief quotes from the libel (unwittingly, we feel assured), to show that libellant confined the charge of negligence to the loose boards and the mat. He overlooked the fact, shown on page 33 of the Transcript, that at the opening of the trial counsel for libellant admitted that a mistake had been made in alleging that the boards were loose and asked that the libel be amended in that particular, saying:

> "In connection with this I understand there is one mistake made in that the boards were lashed, and it subsequently shows such is true, and I ask that the libel be amended in that regard. The mat was placed upon the boards, and the mat, boards and deck of the ship were wet, and in

> stepping from the Jacob's ladder, the only means to reach the deck was on the mat, thence to the deck, and in stepping on the deck the libellant was caused to fall, the mat slipping from under his feet, and he fell to the deck, a distance of three or three and a half feet, causing the injury for which he claims damages." (Apostles, p. 33.)

It thus appears that that issue was clear from the beginning and that libellant did not depart from the pleadings.

On pages 6 to 10 of their reply brief, counsel for appellant seek to distinguish the passenger cases cited in appellant's brief; which hold that a railroad company must provide steps, or some reasonably safe means for a passenger to descend from the train, and that, under the circumstances surrounding those cases, it was not contributory negligence for the passengers to jump from the steps to the ground. The principal point to which those cases were addressed was the second—that of contributory negligence—which fact opposing counsel appear to have overlooked. Opposing counsel also dwell upon the fact that plaintiffs in those passenger cases were women, and say "there are decided indications that the same rule would not be applied to men." But we venture to say that on the point of contributory negligence, the fact that the passengers were women makes those cases all the more favorable for appellee, since women are not assumed to have the physical strength and agility of men, and a jump that might be risky for a woman might be comparatively safe for a man. Furthermore, in the

Brodie case, the jury found, in accordance with the instructions of the Court, that the plaintiff in jumping had used "such care as a *man* of ordinary prudence and care would have used under the surrounding circumstances."

Counsel for appellant admit on page 6 of their opening brief that "In view of the foregoing facts it is admitted that the 'Coolgardie' owed him (Dr. James) the duty of providing a reasonably safe means of getting aboard the vessel." We agree that this is the measure of the obligation of the vessel, but we maintain that it was not performed. The trial Court found that no reasonably safe means was provided, and that "the exercise of ordinary care would have provided something for them (the boarding officers) to step down upon from the lumber pile."

The trial Court also found that Dr. James was not guilty of negligence in jumping from the lumber pile to the deck and that "an ordinarily prudent person would not have thought it unsafe." It must be borne in mind that Dr. James could neither go back nor stand on the narrow lumber pile, where there was nothing to steady himself by. He had to go forward, and quickly, since Mr. Brown, the Immigration Inspector, was coming up the ladder immediately behind him and Captain Reeves, U. S. A. Boarding Officer, was ascending the ladder immediately behind Mr. Brown. The mat was admittedly wet, the lumber probably so, and it could not be expected that a boarding officer would sit down upon such mat or upon such lumber and ease himself down to the deck. He did the

natural and reasonable thing, which was to jump, as Mr. Brown and Captain Reeves did after him.

There is a manifest and clear distinction between the facts in the case at bar and those in the cases cited by ~~them~~ counsel for appellant, namely: that in the case at bar the danger was remote or barely a possible one, while, in the "Euxinia" and other cases relied upon by appellant, the danger was visible or obvious and very great.

We respectfully submit that the judgment of the lower Court should be sustained.

San Francisco, Cal., June 21, 1919.

F. E. THOMPSON,
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Proctors for Appellee.

THOMPSON & CATHCART,
GRANT H. SMITH,
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